IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 22ND MARCH 2007 / 1ST CHAITHRA 1929

Crl.Rev.Pet.No. 603 of 2000()

CRA.275/1999 of SESSIONS COURT, KOZHIKOE
CC.1366/1997 of JUDL. MAGISTRATE OF FIRST CLASS-II, HOSDRUG

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REVN. PETITIONER(S):

P.M.KURIYAN, S/O.MATHAI,
PARACHUDALYIL HOUSE,
PERUMBACHAL, KALLAR VILLAGE,\
HOSDURG TALUK, KASARAGOD.

BY ADV. SRI.M.RAMESH CHANDER
SRI.M.VIJAYAKUMAR

RESPONDENT(S):

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI.C.K.SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 22/03/2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

Crl.R.P. No.603 of 2000

Dated 22nd day of March, 2007.

O R D E R

Revision petitioner was convicted and sentenced to undergo simple imprisonment for six months and to pay a fine of Rs.1000/- and in default of payment of fine to undergo simple imprisonment for one month under Section 55(a) of the Abkari Act by the Magistrate Court. In appeal, the said conviction and sentence were confirmed and hence this revision.

2. According to prosecution, PW3, the Head Constable got information on 12.1.1997 that arrack was being sold and on such information he proceeded to the place with police party. He found the accused standing with a plastic bag MO2 containing 15 packets of Karnataka arrack. The article was seized under a mahazar, Ext.P1. The accused was arrested. The plastic bag is MO2 and MO3 is the empty packets. A crime was registered and the FIR is Ext.P3. Scene mahazar was prepared by the A.S.I. of police (PW4). He conducted investigation also by questioning the witnesses and laid the charge by filing a report under Section 173(3) of the

Code of Criminal Procedure ('the Code' for short).

3. Learned Magistrate took cognizance of the offence and after trial the accused was convicted and sentenced for offence under Section 55(a) of the Abkari Act. Both the courts below found that the offence in this case discloses that the accused was in possession of arrack and he was convicted and sentenced accordingly. PW1's evidence was not taken into account since he turned hostile to the prosecution, though he was an attestor to the mahazar.

4. Heard. Perused records. As per the evidence and the records, accused was standing carrying a plastic bag containing arrack. There is no case that he was in the court of “transport”, import etc. and hence following the decision reported in **Surendran v. Excise Inspector** [2004(1) KLT 404], he cannot be said to be in possession of liquor. Possession simplicitor is not an offence under Section 55(a) of the Abkari Act.

5. There are various other illegalities also. As per the prosecution case, PW3, the Head Constable received a

telephone message that accused was standing in front of a shop with arrack and he had proceeded to the spot with the police party. It is on receipt of a telephone message that PW3 proceeded to the spot to detect the crime and proceed against accused. The alleged telephone message itself reveals that the offence under the Abkari Act is being committed by a person and the officer ought to have confirmed that whether he has the power to proceed against the person for the offence under the Abkari Act. But PW3, who is the Head Constable, is not the empowered officer to arrest the accused, under Section 34 read with the notification S.R.O.321/96. The above notification has come into force with effect from 29.3.1996 and Head Constable who is below the rank of Sub Inspector of Police is not an empowered officer who can arrest the accused under Section 34 of the Act.

6. In this case, learned Magistrate proceeded on the basis of a report submitted under Section 173(2) of the Code. There is clear bar in section 50 for the Magistrate to inquire into the offence and try the offender under the Abkari Act on the

basis of a report submitted under Section 173(3) of the Code. The Magistrate thus have the power or jurisdiction to take cognizance of the offence under the Abkari Act, in the absence of a report under Section 50 from an Abkari Inspector. For exercising the powers and to inquire into the offence and try the offender, there must be report from the Abkari Inspector as stated in Section 50.

7. On the facts also, there is nothing to connect the accused with the contraband article. Though the evidence of PW3 shows that the article was seized from the possession of the accused, he has not stated as to how he verified or whether the article is contraband article or not. He has not tested the article by taste or smell. It is also seen from Ext.P1 and the FIR Ext.P3 that these documents will not disclose that any sample was taken from the article seized to be sent for chemical analysis. The mahazar is silent about any such seizure from the accused. Therefore, there is no evidence to show that the article analysed as per Chemical Analysis Report was the one seized from petitioner. The conviction and sentence passed

against revision petitioner are illegal and are liable to be set aside.

8. In the result, conviction and sentence passed against revision petitioner are set aside. The petitioner is found not guilty and he is acquitted of offence under Section 55(a) of the Abkari Act. He is set at liberty forthwith.

This Revision Petition is allowed.

K.HEMA, JUDGE.

Krs